

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19

HSP INVESTMENT I, LLC,  
A WASHINGTON LLC,  
d/b/a BIRCHVIEW, A MEMORY  
CARE COMMUNITY,  
Employer

and

Cases 19-RC-15349

INTERNATIONAL ASSOCIATION  
OF MACHINISTS & AEROSPACE  
WORKERS, DISTRICT LODGE 751,  
AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned makes the following findings and conclusions.<sup>1</sup>

**I. SUMMARY**

HSP Investments I, LLC, d/b/a Birchview Memory Care Center ("the Employer"), is a Washington limited liability company that operates a facility in Sedro-Woolley, Washington (the "facility") where it provides long-term care to memory-impaired residents.

Machinists, District Lodge 751 ("Petitioner"), filed the instant Petition seeking to represent a unit of approximately 22 caregivers, 3 housekeepers, 3 dishwashers, 2 cooks, 6 wellness nurses (which include licensed practical nurses, or LPNs' and a registered nurse, or RN<sup>2</sup>).

---

<sup>1</sup> The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

<sup>2</sup> At the hearing, the parties stipulated that the RN is not a professional employee as defined in Section 2(12) of the Act.

The Employer contends, contrary to Petitioner, that the petitioned-for unit is inappropriate because 1) the licensed nurses are supervisors as defined in Section 2(11) of the Act and, therefore should be excluded from the unit; and 2) the unit should include the following classifications: administrative assistant, weekend receptionist (a position that is currently vacant), community relations director, and activities director.

Based on a careful review of the record evidence and the parties' contentions, arguments, and briefs,<sup>3</sup> I conclude that the licensed nurses are not statutory supervisors as they lack the authority to assign, responsibly direct, or discipline caregivers or other employees using independent judgment and because their role in evaluating caregivers is neither regular nor substantial. I further conclude that the activities director position is directly related to, and is functionally integrated with, the rest of the Employer's resident care operation and, therefore, should be included in the unit. Contrary to the Employer, however, I conclude that the community relations director, administrative assistant, and part-time receptionist positions do not share a sufficient community of interest with the petitioned-for unit and the activities director and, therefore, should be excluded from the unit.

Below, I have provided a section summarizing the facts in this matter. Following the "Facts" section is my analysis of the applicable legal standards in this case and my conclusions. Finally, I set forth below details of the directed election, and the procedures for requesting review of this decision.

## **II. FACTS<sup>4</sup>**

### **A. General Overview**

HSP Investment I, LLC, d/b/a Birchview, A Memory Care Community (the Employer), operates a long-term care facility in Sedro-Woolley, Washington (the "facility"), where it provides medical care, including nursing care and medication administration; assistance with activities of daily living (e.g., hygiene, dressing, bathing, and feeding); and housekeeping services to memory-impaired residents.

While the Employer can accommodate up to a maximum of 60 residents at the facility, the typical occupancy averages about 50 residents.<sup>5</sup> Residents live in private or semi-private (*i.e.*, shared with one other resident) apartments on two floors of the facility. The apartments are contained within a locked ward for residents' safety.

"Caregivers" (a classification made up of certified nurse assistants, or CNAs, and non-certified caregivers) and licensed nurses (currently licensed practical nurses, or

---

<sup>3</sup> The Employer and Petitioner submitted timely briefs, which were fully considered.

<sup>4</sup> The Employer called as witnesses Randall Wilson, Executive Director of the facility; Marika Johnson, Director of Operations for Senior Services of America; Leta Benfield, Director of Wellness at the facility, and facility LPNs Tammy Schofield, Charlene Runyon, and Michele Franklin.

<sup>5</sup> At the time of the hearing the Employer was serving 56 or 57 residents at the facility.

LPNs, and one registered nurse, or RN) provide direct care to residents. Licensed nurses and the three (3) caregivers with medical technician certification ("med techs") administer medication; licensed nurses and all caregivers provide residents assistance with activities of daily living. Meals are prepared by cooks, but delivered to residents in the dining room by caregivers. Housekeepers clean residents' apartments and common areas.<sup>6</sup>

At the facility, the Employer also employs a community relations director,<sup>7</sup> an activities director,<sup>8</sup> and an administrative assistant. In the past, the Employer has employed a part-time weekend receptionist; that position was unfilled at the time of the hearing, but the Employer presented evidence that it has recently posted that position.<sup>9</sup>

Nurses and caregivers report to the Director of Wellness; dishwashers and cooks report to the Dietary Manager; and housekeepers report to the Maintenance and Housekeeping Supervisor. The Director of Wellness, the Dietary Manager, and the Maintenance and Housekeeping Supervisor all report to the Executive Director. The community relations director, the activities director, the administrative assistant, and the part-time receptionist (when employed) also report directly to the Executive Director.

Department managers have the authority to hire for their departments. The record evidence suggests that the Executive Director only gets involved in hiring decisions when an applicant's background check turns up negative information.

The Community Employee Handbook for Birchview sets forth the policies and procedures in place covering all employees at the facility; the Employer also maintains a set of human resources policies for the facility. Employees each get a copy of the employee handbook, but not the human resources policies (which is accessible only by the Executive Director, the administrative assistant, and department managers). Employees get a copy of their job descriptions, but not those of other employees.

The Employer maintains a progressive discipline policy, *i.e.*, verbal or written counseling or warnings are considered steps in the discipline process; such occurrences may lead to more serious discipline, up to and including termination of employment.

The Executive Director determines employees' wages based on employees' experience, their training, their references, and what previous, similarly skilled employees received when starting at the facility. Based on that assessment, employees are paid as follows:

Licensed Nurses - \$16 to \$19.58 per hour;  
Caregivers - \$8.75 to \$10.51 per hour;

---

<sup>6</sup> The Employer defines housekeepers to include employees who perform cleaning services, as well as employees who perform laundry services.

<sup>7</sup> At other facilities operated by the Employer, the community relations director position is sometimes referred to as the Marketing Director.

<sup>8</sup> At other facilities operated by the Employer, the activities director position is sometimes referred to as the Social Programs Director.

<sup>9</sup> The weekend receptionist, if hired, would work four (4) hours each on Saturdays and Sundays.

Housekeepers - \$8.75 to \$9.40 per hour;  
Cooks - \$10 an hour;  
Dishwashers - \$8.55 to \$8.75 an hour;  
Administrative Assistant - \$16.51 per hour;  
Activities Director - \$12.00 per hour.

The community relations director earns a salary of \$734 per week, plus a commission of \$100 for each resident who moves into the facility. The community relations director's pay is determined by the Employer at the corporate level.<sup>10</sup> The record is unclear as to what the part-time weekend receptionist will earn.

Full-time employees are eligible to receive certain insurance benefits, but part-time employees are not;<sup>11</sup> eligibility is determined by an employee's average weekly hours worked over a given period of time.<sup>12</sup> Employees are grouped in different benefit categories or classifications, based on their particular status. Category 2 includes the Executive Director, the Director of Wellness, and the community relations director. Category 3 includes licensed nurses, the activities director, the dietary manager, the Housekeeping and Maintenance Supervisor, and the administrative assistant. Category 4 includes caregivers, dishwashers, cooks, and housekeepers. Category 5 is reserved for employees in part-time classifications, which the Employer defines as employees working fewer than 35 hours per week.

Category 2 and 3 employees are eligible to receive Premier Blue Cross health insurance, and Assurant dental insurance. Category 4 employees may opt to receive health insurance through Colonial.<sup>13</sup> For Category 3 employees, the Employer pays 85 percent of the employee premium; for Category 4 employees, the Employer pays all but \$5 of the monthly cost for the standard level of coverage.

All employees may participate in the 401(k) plan, once they have worked the required number of hours. In short, after one year of employment, employees who have worked one thousand (1,000) hours are eligible to participate in the 401k plan. The 1,000 hours is a one-time threshold, and may be obtained cumulatively, that is, employees' do not lose credit for hours worked and an employee could meet the 1,000-hour threshold in, for example, their second or third year of employment. The Employer does not currently match employee contributions, but when it has, the match was the same for all employees.

---

<sup>10</sup> The Employer considers the community relations director, like the Executive Director and the Director of Wellness, to be an "exempt" employee as defined by the Fair Labor Standards Act.

<sup>11</sup> The Employer defines part-time employees as any employee working fewer than 35 hours per week.

<sup>12</sup> The record is unclear as to how long that period of time is, or how often – if ever – the plan administrator responsible for determining eligibility reviews employees' hours to determine eligibility.

<sup>13</sup> Employees may choose between participating in the basic plan, or paying more for a plan with relatively better benefits.

Until May 2009, certain employees could earn paid time off (PTO); part-time and temporary employees were not eligible to receive PTO, and the record is unclear as to whether exempt employees may earn PTO. The Employer's PTO plan combined vacation and sick leave hours, so that employees could use PTO as needed. Employees could "bank" up to a certain maximum;<sup>14</sup> once employees dropped below the maximum they could continue to "bank" hours. About May 2009, accrual ceased.

The Washington Administrative Code ("WAC") requires that all employees at the facility receive training with regard to the fundamentals of care giving, modified fundamentals of care giving, dementia care giving, and mental health care giving. According to Director of Wellness Leta Benfield, fundamentals of care training provides "very basic" training for providing hands-on care (e.g., dressing, undressing, brushing residents' teeth, washing residents' faces, toileting residents; transferring residents; and feeding residents and/or assisting resident with feeding). "Modified fundamentals of care" is available for employees who already have experience providing care, such as nurses and caregivers.

Dementia care is specifically designed to train employees for caring for people with dementia. That training is required to provide employees with, for example, an understanding of what dementia is, and an understanding of how to communicate with residents with dementia, as well as necessary skills for dealing with certain behaviors commonly associated with dementia.

Because residents with dementia often suffer from other mental health issues, mental health care training provides employees with, for example, strategies for communicating with a resident who may be delusional or suffering from depression.

The fundamentals of care giving course can be a 24- or 28-hour class. The dementia care and mental health care classes are six (6) to eight (8) hours each.

Also required by the WAC, all employees working at the facility must receive HIV/AIDS, food health nurse, first aid, and CPR training. HIV training educates employees as to how HIV is transmitted, appropriate protective measures, etc. Food service training ensures that employees are trained to properly prepare, maintain and handle food. Basic first aid and CPR courses are self-explanatory.

The Employer's dress code policy does not specify what employees must wear; rather it suggests "more of what they cannot wear." By way of example, it is understood that employees may not wear jeans or T-shirts with prints, and they may not have visible facial piercings. Cooks and dishwashers are expected to wear white tops and black pants; nurses and caregivers usually tend to wear medical "scrubs," but some may wear street clothes when providing care to residents. The activities director, the administrative assistant, and the community relations director generally wear what may be described as "business casual" attire or street clothes.

---

<sup>14</sup> The maximum number of hours an employee may bank depends on their tenure with the Employer: the maximum for second year employees is 120 hours; the maximum for third and fourth year employees is 180 hours; and the maximum for employees with five or more years of service is 240 hours.

All employees have access to the lunch room and smoking area. Lunch breaks for all employees are 30 minutes. Caregivers usually have set lunch or break times, but those may be affected by resident care issues. The administrative assistant, the activities director, and the community relations director are free to take their lunch and breaks lunch at their convenience.

All employees wear gold, oval badges with their name and job classification.

## **B. Overview of Resident Care**

The Employer provides around-the-clock care to residents in a two-story, locked ward of private and semiprivate apartments. Care is administered by the Director of Wellness, licensed nurses, and caregivers.

Each floor has a nurses' station and a medication room. Caregivers and licensed nurses have access to the nurses' stations, but only licensed nurses and med techs have access to the medication rooms.

The Director of Wellness supervises and directs the care of residents at the facility, including medical care administered by the licensed nurses, and the personal care given by the caregivers.<sup>15</sup> The Director of Wellness also observes the care that nurses and caregivers provide to residents, talks to nurses and caregivers regarding changes to residents' medical conditions and other issues of concern, and, when appropriate, visits with residents and family members. Related to her observation of the residents and the care provided to them, the Director of Wellness may offer her opinion regarding discrete situations or issues to assist the nurses in providing adequate care. The Director of Wellness also assists residents as needed.

The Director of Wellness assesses each resident when they arrive at the facility and, based on that assessment, creates care plans unique to each resident. The individualized care plan outlines each resident's needs, from frequency for toileting to frequency of nail care. Residents' care plans are kept together in books at the nurses' stations for licensed nurses and caregivers to review and follow.

Based on her ongoing assessments of residents, the Director of Wellness creates monthly and daily schedules to ensure that care plans are carried out. With regard to daily assignments, the Director of Wellness creates and posts at each of the nurses' stations a "floor assignment schedule" that serves as the "master plan" for where staff will work. Pursuant to that schedule, caregivers are assigned to a particular set of rooms or apartments, as well as their assignments for the day.

The State of Washington requires that a licensed nurse, either an RN or an LPN, provide oversight of caregivers in settings like the Employer's facility. If the oversight is provided by an LPN, an RN must provide oversight to the LPN. At the time of the hearing, the Employer had approximately six (6) Licensed Nurses (five LPNs and one RN) and approximately 20 – 22 Caregivers on staff.

---

<sup>15</sup> The current Director of Wellness, Leta Benfield, is a registered nurse and estimates that half of her time is spent out of her office in the locked ward with licensed nurses, caregivers, and residents.

Licensed nurses perform medical care functions, e.g., administering medication, monitoring the health and well-being of the residents, identifying changes in residents' conditions, and notifying the Director of Wellness, appropriate physicians, and family members of emergent issues.

The State of Washington does not require that caregivers obtain any particular certification and, indeed, not all caregivers at the Employer's facility are certified. To obtain certification, caregivers attend special classes and off-site clinical training. Caregivers perform the same tasks regardless of whether they are certified; three caregivers are certified as medical technicians ("med techs"). Certified and noncertified caregivers assist residents with activities of daily living, including assistance with meals, bathing, toileting, dressing and other daily tasks.

Only licensed nurses and the three med techs may administer medications; caregivers may not, under Washington State law, administer any kind of medication to residents. Caregivers may assist residents in taking medication (e.g., hand them medication and watch them take it).<sup>16</sup> Whether a resident is an "assist" or an "administer" is determined by the Director of Wellness at the time of her initial assessment of the resident and included in the care plan. It is unclear from the record whether licensed nurses have the authority to change a resident's status, e.g., from "assist" to "administer" without the Director of Wellness's approval.

Licensed nurses have the authority to change daily assignments in discrete situations, and have, on an as-needed basis, changed caregivers' daily assignments. Examples of such reassignments include: when a caregiver is late, or leaves early due to illness and reassignments are necessary to ensure proper resident care; and after a resident or a resident's family member makes a request regarding the sex of the resident's caregiver(s). There is no evidence that licensed nurses reassign caregivers based on the nurse's assessment of the caregivers' relative skills and the tasks at hand.

The Employer staffs three different shifts at the facility. The day shift is 6 a.m. to 2 p.m.; the evening shift is 2 p.m. to 10 p.m.; and the third shift is from 10 p.m. to 6 a.m.

Five caregivers work the entire day shift, and one caregiver works part of the day shift, from 7 a.m. to 1:30 p.m. Four caregivers work the entire evening shift, and one caregiver works 3:30 p.m. to 9 p.m. Two caregivers work the entire third shift, and one caregiver works 11 p.m. to 6 a.m.

From 6 a.m. to 7:00 a.m., one licensed nurse works with the five (5) caregivers on duty. From 7 a.m. to 1:30 p.m. there are two (2) licensed nurses on duty with six (6) caregivers. After 5:30 p.m. one licensed nurse works with five (5) caregivers. There are no licensed nurses working the third shift.

The Director of Wellness is generally at the facility from 8:30 a.m. to 6 p.m., but as indicated above, is available by cell phone outside her normal working hours.

---

<sup>16</sup> Occasionally, medicine is crushed and added to pudding or yogurt for the resident to take. If the resident can feed himself, a caregiver can assist, but if the resident cannot feed himself, a licensed nurse must administer it. Cooks are not involved in the medication process.

Although no caregivers, dishwashers, cooks, or housekeepers testified at the hearing, the record suggests that other than when those employees enter the locked ward to perform discrete tasks, the licensed nurses and caregivers have little regular interaction with employees outside the locked ward.

### **C. Licensed Nurses' Duties and Responsibilities**

#### **1. Authority to Assign**

As noted above, the Director of Wellness schedules employees to specific shifts and residents, and creates assignment sheets for each shift describing the tasks for the day, consistent with the residents' care plans. The assignment sheets note, for example, which residents need to be bathed or need to have their nails done, as well as which resident need to have their vital signs checked.

Patient care is provided by the Director of Wellness, licensed nurses, and caregivers, with licensed nurses primarily responsible for medical care, and caregivers responsible for attending to activities of daily life. According to Benfield, licensed nurses spend 40 – 50% of their time making rounds to the residents' rooms, making sure that the residents are clean, that their oral and nail care has been completed, that the residents have been fed and toileted, ensuring that residents mealtimes have been documented, ambulating residents as needed, showering residents, and following through with residents' care plans.

Licensed nurses have the authority to assign caregivers certain routine tasks, such as recording residents' blood pressure, pulse, temperature, and weight, as dictated by the care plans, or collect urine samples, if ordered by a physician. If a resident is sick, a licensed nurse may assign a specific caregiver to ensure that the resident is turned frequently, and offered appropriate fluids. If a resident is unable to come to the dining room, a licensed nurse may have a caregiver take the resident's meal to the resident's room and assist the resident with eating or assist the resident with maintaining a position that will allow them to feed themselves. At all times, licensed nurses retain responsibility for more complex tasks, such as monitoring residents and reporting changes in residents' conditions to physicians, as well as regulated tasks, such as medication administration.

The record evidence does not provide specific examples of licensed nurses choosing specific caregivers to perform specific tasks. For example, LPN Michele Franklin testified generally that she took a resident's needs into account when assigning a caregiver to assist in the resident's care, but she did not explain what process, if any, she followed to determine whether one employee or another would be better suited for a particular task or situation.

In discrete situations, licensed nurses may reassign caregivers to meet residents' needs and generally do not need prior approval from the Director of Wellness, nor must they report changes after the fact. One example cited during the hearing is when a caregiver is injured and, therefore, unable to perform heavy lifting; in such cases the licensed nurse may reassign the caregiver work with less demanding physical requirements. Other examples include situations where residents are "not receiving [a caregiver] well" or a family member has requested that a resident not receive care from



caregiver of a particular sex,<sup>17</sup> or where caregivers assigned to the same area are “feuding” and separating the caregivers will abate the underlying conflict. Many cases of temporary reassignment, such as helping to move a resident, appear to be routine and may be initiated by the caregivers themselves, who will recognize the need to have more than one caregiver involved.

Franklin testified that she has told caregivers who call in sick to report to the facility to be evaluated. In most cases, the caregivers came to the facility, but almost always went to work rather than be evaluated by the licensed nurse. Franklin also testified, however, that she has never directed employees to come into work, only to come in to be evaluated.

Licensed nurses’ authority to change caregivers’ schedules is limited to a day-to-day, shift-by-shift basis, and only where an employee has called in sick, or has to leave early due to illness. Licensed nurses are implicitly authorized to assign overtime if, to adequately provide patient care, the licensed nurse must call in an employee or ask an employee to stay late. The record suggests that licensed nurses do not have the authority to require any caregiver to come in to work or remain at the facility until adequate coverage is obtained.

## **2. Responsibly Direct**

The record evidence shows that in some cases where a caregiver failed to adequately carry out a patient care-related task, the Director of Wellness has verbally counseled the licensed nurse on duty when the alleged failure occurred. The licensed nurses who testified at the hearing all expressed their belief that, as the licensed nurse, they are ultimately responsible for patient care. Runyon and Schofield each testified that they had been counseled once by Benfield to ensure that caregivers provide complete patient care; Runyon also testified that she might hear from a resident’s family if care was inadequate. Franklin testified that she based her sense of responsibility on her 40 years as a licensed nurse.

To ensure that caregivers are following each resident’s care plan, licensed nurses will walk the halls and periodically check on caregivers’ work. Licensed nurses may also see that caregivers are taking breaks at the correct time and, when necessary, break up gatherings of caregivers that might keep them from attending to residents.

Other than the verbal counseling described by Runyon and Schofield, and the comments from family members recalled by Runyon, licensed nurses have not received any discipline related to a caregiver’s actions or inactions.

## **3. Discipline**

As part of the Employer’s progressive discipline policy, documented verbal counseling and written warnings are forwarded to the Director of Wellness and placed in the appropriate employee’s personnel file. The record contains a number of examples of documented verbal counseling and written “warnings” that licensed nurses have issued to caregivers, apparently without prior approval or subsequent investigation. In some cases, the Director of Wellness may sit down with the caregiver and get their input;

---

<sup>17</sup> Such changes, if permanent, are incorporated into the care plan going forward.

simple policy violations do not warrant follow-up (lip ring and jeans), but more serious issues would warrant follow-up.

Licensed nurses have the limited authority to verbally counsel caregivers and to document verbal counseling and issue written warnings regarding job performance issues and policy violations only (licensed nurses do not have the authority to suspend or terminate an employee's employment).<sup>18</sup> Licensed nurses do not need approval from the Director of Wellness to issue verbal counseling or written warnings. Written counseling consists of documenting the facts underlying a perceived deficiency and forwarding it to the Director of Wellness, either directly or by slipping it under the locked door to her office. In serious cases, the Director of Wellness may meet separately with the licensed nurse and caregiver involved, but in most cases the documented counseling or warning is placed in the caregiver's personnel file without further action.

Examples of performance issues or policy violations include attendance issues, such as tardiness or no-call/no-show; cell phone use during working time; violations of the dress code; and suspected verbal abuse of a resident. With regard to minor violations, such as tardiness or cell phone use, the licensed nurse may use some discretion in whether to engage in undocumented counseling or document the counseling or warning for the Director of Wellness's information. With regard to flagrant policy violations (e.g., abuse of a resident, violations of the WAC, or extreme tardiness or no-call/no-show), licensed nurses testified that they feel they have no choice but to document the warning.

Licensed nurses have the authority to send caregivers home in discrete situations. The three examples cited by the Director of Wellness were 1) in cases of suspected resident abuse, 2) in cases of policy violations, such as sleeping on the job; and 3) cases where the caregivers are obviously ill. However, after a caregiver is sent home for suspected abuse, or a suspected drug or alcohol violation, the Director of Wellness and/or the Executive Director conducts an investigation of the caregiver's alleged misconduct.

#### **4. Performance evaluations**

Evidence regarding performance evaluations establishes that they are not regularly occurring, nor do they automatically lead to adjustments to employees' rates of pay. For example, the activities director, administrative assistant, and the community relations director have not been reviewed since at least 2007; employees in the receptionist position have never been evaluated. The most recent complete evaluation of caregivers was in 2008 when seven (7) caregivers received reviews.<sup>19</sup>

---

<sup>18</sup> The record contains examples of documented counseling and warnings that span the time period April 13, 2008, to December 5, 2009. No examples of documented counseling or warnings from 2010 were offered into evidence.

<sup>19</sup> The relatively low number apparently reflects turnover in the caregiver position and the likely circumstance that only so many employees had been working long enough to receive a performance evaluation.

The most recent, complete round of caregiver evaluations occurred in 2008, but the Employer did not retain copies of those evaluations. Up to that point, the practice, with regard to caregivers' evaluations, was for the Director of Wellness to solicit input from licensed nurses, review the licensed nurses' observations, and if appropriate, incorporate them into the evaluation with the Director of Wellness's observations (if the Director of Wellness considered a licensed nurse's observations or comments to be wholly inaccurate, she would not incorporate them in the evaluation). Once the comments were incorporated, the Director of Wellness would review the performance evaluations with the Executive Director, who retained his authority to change evaluations. Ultimately, the Director of Wellness and the Executive Director meet with the caregiver to discuss the evaluation, providing the caregiver an opportunity to address negative comments.

The record evidence suggests that ratings from the 2008 evaluations were linked to pay raises for some employees, but the record is unclear as to how the ratings correlated to increases. For example, some employees received raises for \$.50 or .53 an hour, but it is unclear what the maximum raise was (it could have been \$.60 per hour), what employees' average scores were, or how the scores in various areas correlated to the overall raises.

The current evaluation system was designed in late-September and implemented then or early-October. The Employer designed new evaluation forms, copies of which are in the record, which include opportunities for reviewers to rate caregivers as "unacceptable," "needs improvement," "successful," "exceeds expectations," or "outstanding."<sup>20</sup>

Not all licensed nurses participated in the most recent performance evaluations, only the most senior among them, but their testimony regarding their role was consistent. In early October, the Director of Wellness handed each of the licensed nurses three (3) blank forms for them to fill out as they saw fit; none were given specific instructions as to how to complete the forms other than to leave the "position duties" section blank. None were explicitly told that the evaluations could affect the employees' job status or pay. The licensed nurses took the evaluation forms home to complete on their own time. The record is unclear as to how much time the licensed nurses spent on each evaluation, but Franklin testified that she spent about 40 minutes for each evaluation (about two (2) hours total).

The licensed nurses completed the evaluations and returned them to the Director of Wellness, who then reviewed them and incorporated her own comments. The Director of Wellness has not yet met with the caregivers to discuss the evaluations; thus, it is unclear how the evaluations will be used to assess employees' performance, or whether the evaluations will affect employees' job status or pay.<sup>21</sup>

---

<sup>20</sup> The record contains examples of the forms used to evaluate community relations director, administrative assistant, the activities director and department managers in 2006 or 2007, as well as the forms used to evaluate dishwashers, cooks, and housekeepers.

<sup>21</sup> Because the Employer has been under a pay freeze for some time, evaluations do not automatically result in raises for employees.

## **5. The Authority to Hire, Discharge, or Effectively Recommend**

The Director of Wellness is responsible for hiring and firing in that department. Licensed nurses have no role in the hiring process, and do not have the authority to terminate any employee's employment. The record does not contain evidence that licensed nurses have effectively recommended termination. To the contrary, the one instance where a licensed nurse believed an employee had committed a terminable offense and reported it to the Director of Wellness, her recommendation was not followed, and instead the employee received counseling and a suspension.

## **6. Secondary Indicia**

The Executive Director, department managers, the administrative assistant, the activities director, and the community relations director attend daily "stand-up" meetings to discuss issues of the day, such as activities planned for the facility, new staff, resident arrivals, etc. Licensed Nurses do not attend these meetings.

Licensed nurses are paid more and are eligible to receive benefits than other employees in the petitioned-for unit. The record is unclear as to when and on what basis licensed nurses last received pay increases.

The Employer also asserts that the ratio of caregivers to licensed nurses establishes the licensed nurses' supervisory status. The Employer also asserts that, if licensed nurses are not supervisors, caregivers would be unsupervised for large portions of the day and weekends.

The job descriptions for licensed nurses state that licensed nurses are responsible for supervising resident care staff. The Employer also asserts that the licensed nurses who testified all perceive themselves to be supervisors.

## **D. Other Employees' Duties and Responsibilities**

### **1. Cooks, Dishwashers, and Housekeepers**

The duties and responsibilities for the Employer's cooks, dishwashers, and housekeepers are contained in the corresponding job descriptions, but are generally self-explanatory, and largely addressed above in the overview of the Employer's operation. All employees in these categories work part-time: housekeepers work 8 a.m. to 4:30 p.m.; dishwashers work 10:15 a.m. to 2 p.m., or 4:30 p.m. to 8 p.m.; cooks work 7 a.m. to 3 p.m., or midday to 5:30 p.m.

### **2. Activities Director**

The activities director is responsible for planning and carrying out resident activities. Some examples of the activities director's responsibilities include creating a monthly calendar of activities for residents, which is included in a monthly newsletter; running activities in the facility; acting as the van driver for activities away from the facility (such as shopping trips); and arranging for guest speakers to visit the facility. The activities director may also act for the Executive Director in his absence.

The current activities director typically works 10 a.m. to 3 p.m., Monday through Friday, and occasionally attends weekend activities that she or the community relations director has scheduled. All told, the activities director works about 22 hours per week in that capacity.

In addition to her regular duties, the activities director also works as a caregiver on an as-needed basis. The record evidence shows that the activities director works as a caregiver two or three times a week, for up to eight (8) to ten (10) hours per week.

The activities director earns \$12 an hour, regardless of whether she is working in her capacity as the activities director or as a caregiver.

The Executive Director evaluates the activities director's work performance.

### **3. Community Relations Director**

As noted above, the community relations director reports directly to the Executive Director and earns a salary plus a commission. Primarily concerned with sales of residencies, the community relations director usually works outside the facility,<sup>22</sup> but has an office across the lobby from the Executive Director and the administrative assistant.

An exempt employee, the community relations director usually works 40 hours per week, 8:30 a.m. to 5:00 p.m., Monday through Friday. On those occasions when he works weekends for an event, his weekly schedule is manipulated to stay at or near 40 hours total for the week. According to the job description for the community relations director position, the community relations director may act for the Executive Director in his absence.

The community relations director introduces prospective and new residents to the building, the community at large, and staff members, but otherwise has little contact with licensed nurses and caregivers. As required by law, and having attended required training, the community relations director has "knowledge" related to caregiving, but has no caregiving responsibilities.

The Executive Director evaluates the community relation director's work performance.

### **4. Administrative Assistant**

The administrative assistant works 8:30 a.m. to 5 p.m., and reports directly to the Executive Director. The administrative assistant works alone in an office next door to the Executive Director's, near the facility's entrance and lobby.

The administrative assistant performs general clerical tasks, processes accounts payables for all departments, accounts receivables, billing, and certain human resources tasks (e.g., assisting employees in completing their employment packets when hired, performing clerical functions associated with employees' background checks, etc.). The

---

<sup>22</sup> Generally speaking, the community relations director visits doctors' offices, hospitals, state discharge planners, and various community organizations. He also attends marketing events, and sets up information booths at Alzheimer's Association events and at the Memory Walk.

administrative assistant also signs payroll forms, and all forms regarding the Employer's compliance with residents' rights. In addition, the administrative assistant answers phones for the entire facility,<sup>23</sup> processes discharge paperwork for employees, ensures that the admission process for residents is completed correctly, and discharges residents when they need to be discharged.

The administrative assistant is invited to attend general employee meetings, but the record is unclear as to how often she might attend such meetings.

The administrative assistant also has access to certain confidential information related to "resident, community, company, and salary performance information" as well as information provided in response to background checks and disciplinary records.<sup>24</sup> The record shows that the Executive Director is the only other person with access to that information. The administrative assistant does not provide the Executive Director or any hiring official with her assessment or analysis regarding information provided by references or in response to routine background checks.

The Executive Director evaluates the administrative assistant's work performance.

#### **5. Part-Time Weekend Receptionist**

Because the part-time weekend receptionist ("receptionist") position has been vacant for some time, the record evidence regarding the duties and responsibilities associated with that position is not entirely clear. The job description for that post suggests that the receptionist would report directly to the Executive Director, and would provide receptionist/clerical duties for the facility. Those duties include, *inter alia*, greeting and assisting residents, families, and other staff; organizing filing systems; receiving incoming telephone calls and directing those calls to the appropriate departments, and assisting with tours for prospective residents. The Executive Director will review the receptionist's work performance.

### **III. LEGAL ANALYSIS**

#### **A. Licensed Nurses' Supervisory Authority**

Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or

---

<sup>23</sup> The five telephone lines for the facility apparently are answered by the administrative assistant, described at one point in the record as the "main switchboard operator." Accordingly, calls for food services, patient care, etc., may be taken and transferred to the appropriate department by the administrative assistant.

<sup>24</sup> Some confidential material is maintained in a locked cabinet; only the administrative assistant and the Executive Director have keys to that cabinet. Despite this access to certain confidential information, neither party asserts, nor do I conclude, that the administrative assistant is a confidential employee as defined under the Act.

discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), the Board, citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), iterated its three-part test, which finds individuals to be statutory supervisors if:

(1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11);

(2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and

(3) their authority is held "in the interest of the employer."<sup>25</sup>

The Board has also established that the burden to prove supervisory authority, by a preponderance of the evidence, is on the party asserting it. *Croft Metals, Inc.*, 348 NLRB 717, 721. (2006). See also, *Loyalhanna Health Care Associates t/d/b/a Loyalhanna Care Center*, 352 NLRB 864 (2008). "Purely conclusory" evidence is not sufficient to establish supervisory status; and a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). To qualify as a supervisor, it is not necessary that an individual possess all of the criteria specified in Section 2(11), instead, possession of any one of them is sufficient to confer supervisory status. *Lakeview Health Center*, 308 NLRB 75, 78 (1992). Finally, "whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

## **1. Assign & Responsibly Direct**

### **a. Assign**

"Assignment" is defined as the "giving [of] significant overall duties, i.e., tasks, to an employee", as well as "designating an employee to a place (such as a location, department, or wing), [and] appointing an employee to a time (such as a shift or overtime period)." *Oakwood Healthcare*, 348 NLRB 686, 689 (2006). However, every instruction in the workplace is not an assignment; "significant overall duties" do not include "ad hoc instructions to perform discrete tasks;" these instructions are considered "direction" of a non-supervisory nature. *Id.* Similarly, working assignments made to equalize work among employee's skills, when the differences in skills are well known, are routine functions that do not require the exercise of independent judgment. *Providence*

---

<sup>25</sup> The Supreme Court in *NLRB v. Health Care & Retirement Corporation of America*, 511 U.S. 571 (1994) held that "[s]ince patient care is a nursing home's business, it follows that attending to the needs of patients, who are the employer's customers, is in the employer's interest." Accordingly, this decision will focus its analysis on the first 2 prongs (supervisory criteria and independent judgment) of the *Oakwood* test.

*Hospital*, 320 NLRB 717, 727, 731 (1996), *overruled in part by Oakwood Healthcare*, 348 NLRB 686, 686, fn.29 (2006).

The Board has defined the statutory term independent judgment in relation to two concepts. As an initial matter, to be independent, the judgment exercised must not be effectively controlled by another authority. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006). Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently independent under the Act. *Id.* The mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices. *Id.* The Board further found that the degree of discretion exercised must rise above the routine or clerical in order to constitute independent judgment under the Act. *Id.*

Here, the record establishes that the Director of Wellness, not licensed nurses, determine what shifts caregivers will work, where in the facility they will work, and what tasks they will perform to effectuate the residents' care plans. While licensed nurses may play a role on an *ad hoc* basis, the record lacks sufficient evidence that the licensed nurses use independent judgment in that role.

The record suggests that caregivers' assignments are routine or dictated by circumstances. The care plan for each resident dictates what tasks need to be performed on a given day, and the floor schedule determines which caregiver will assist which resident. Situations that call for changes to the floor schedule are not dictated by caregivers' relative skills, but by such factors as the resident's preference for a caregiver of a particular sex, a caregiver's relative health, or the caregivers' ability to get along. Reassigning a male caregiver from a female resident, giving an ailing caregiver light-duty tasks, or separating bickering co-workers does not require independent judgment.

Addressing staffing issues on an *ad hoc* basis similarly fails to establish that licensed nurses have the authority to "assign" caregivers. If a caregiver calls in sick or has to leave early, the licensed nurse will seek coverage by requesting that an employee stay until relief arrives, or by calling other caregivers to fill-in. However, supervisory authority means that the putative supervisor has the ability to *require* that certain action be taken; supervisory authority is not established where the putative supervisor merely has the ability to request that a certain action be taken. *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006), *citing Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001).

The record suggests that a licensed nurse's request that a caregiver stay beyond his or her shift, or come in to cover for another caregiver may result in overtime for the covering caregiver. The record, however, does not contain specific examples of how often or how much overtime has been incurred as the result of such assignments. Thus, I conclude that the Employer has also failed to establish that licensed nurses exercise independent judgment in assigning overtime.

#### **d. Responsibly Direct**

The Employer asserts that licensed nurses responsibly direct caregivers. The Board defines the statutory term responsibly direct as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both



responsible...and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB 686, 692 (2006). Further, with responsible direction, the Board said, “We agree with the circuit courts that have considered the issue and find that for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one performing the oversight if the tasks performed by that employee are not performed properly.” *Id.* Thus, accountability is established where putative supervisors have the authority to take corrective action and are subject to adverse consequences for the performance of their staff. *Id.*

The requisite showing of accountability is not present where the putative supervisor is disciplined because of his or her own inadequate performance. Rather, the requisite showing is present only when the putative supervisor satisfactorily performed his or her own duties but nevertheless is disciplined because the staff failed to properly perform their tasks. For example, lead persons in a manufacturing setting were held accountable where they received written warnings because their crews failed to meet production goals. *Croft Metals*, 348 NLRB at 722. On the other hand, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. *Oakwood Healthcare*, 348 NLRB at 695.

Here, in contrast to *Croft Metals*, there is an absence of evidence that the licensed nurses are subject to discipline or other immediate consequences for the actions or inactions of the caregivers with whom they work. Rather, the record contains evidence that on two occasions the Director of Wellness counseled licensed nurses to make sure caregivers performed the tasks necessary to effectuate residents’ care plans. Those examples, however, do not clearly establish that the Director of Wellness was addressing the caregivers’ deficiencies, or the licensed nurses’ failures. Regardless, no licensed nurse has received meaningful discipline, e.g., a written warning or suspension, as the result of a caregiver’s action or inaction. Accordingly, I conclude that licensed nurses do not responsibly direct caregivers.

## **2. Discipline**

The Board recently reaffirmed that actual authority to discipline, rather than “paper authority” is necessary to establish supervisory status. *Loyalhanna Care Center*, 352 NLRB at 865, citing *Golden Crest*, 348 NLRB 727. The power to point out and correct deficiencies in the job performance of other employees is insufficient to establish that an employee is a supervisor under Section 2(11) of the Act. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) (reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations). In addition, an employee does not become a supervisor if his or her participation in personnel actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will effect employees’ job status. *Id.*, at 830 (2002) (reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations); see also, *Ohio Masonic Home*, 295 NLRB 390, 393 (1989) (although documents were placed in an employee’s personnel file, the record did not establish that the warnings automatically led to any further discipline or adverse action against an employee). Rather, to confer 2(11) status, the exercise of disciplinary authority must

lead to personnel action, without the independent investigation or review of other management personnel. *Ten Broeck Commons*, 320 NLRB 806, 812 (1996) (such authority is not supervisory unless it results in "personnel action ... taken without independent investigation or review by others"); see also, *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001); *Family Healthcare*, 354 NLRB No. 29, slip op. at 7 (June 4, 2009).

In cases involving a system of progressive discipline, however, even warnings which do not lead to direct and immediate adverse consequences can still be disciplinary in nature if they pave the way for future disciplinary action. In *Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center*, 351 NLRB No. 9, slip op. at 4 (2007), the Board found that counseling forms completed by Nurses constitute a form of discipline, even if such forms do not lead to immediate consequences, because such forms can lay out the foundation for future discipline. Similarly, in *Promedica Health Systems*, 343 NLRB 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6<sup>th</sup> Cir. 2006), the Board found a direct link between recorded verbal coachings and future disciplinary action. See also, *Progressive Transportation Systems, Inc.*, 340 NLRB 1044, 1046 (2003) (written discipline notices issued by purported supervisor relied on and specifically referenced by management when administering subsequent discipline). See also, *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1064 (2006).

Here, the record contains a number of examples of documented verbal counseling and written warnings authored by licensed nurses, though none more recent than December 2009. The record also indicates that the documented counseling and warnings were passed on to the Director of Wellness and copies placed in caregivers' personnel files. However, there is no evidence that the written discipline automatically leads to more severe or immediate consequences. To the contrary, the evidence suggests that only in the most serious cases reported does the Director of Wellness conduct any follow-up with the licensed nurse or the caregiver involved. Thus, while the Employer maintains a progressive discipline system, and documented verbal warnings and written discipline are considered steps in that system, there is insufficient evidence to establish that infractions reported by licensed nurses regularly "progressed" to a higher disciplinary level. As such, I conclude that the licensed nurses' ability to document caregivers' infractions does not constitute supervisory authority to discipline. See, e.g., *Phelps Community Medical Center*, 295 NLRB at 490-91.<sup>26</sup>

I also conclude that the licensed nurses' ability to send employees home for obvious misconduct (e.g., intoxication) is insufficient to establish their supervisory authority. The Board has found that the authority to send employees for flagrant misconduct does not constitute statutory supervisory authority. *Phelps*, 295 NLRB at 491-92.

---

<sup>26</sup> I acknowledge that the record contains testimony from licensed nurses suggesting that they exercise independent judgment when deciding whether or not to issue verbal counseling and written warnings, and that they may discuss with caregivers the potential consequences if they fail to improve their performance. However, based on the quantum of record testimony and evidence, I find that the Employer has failed to establish a direct link between such counseling and any immediate or future discipline, other than additional counseling by the Director of Wellness. Thus, I conclude that licensed nurses' role in the Employer's disciplinary system is insufficient to establish that they possess the authority to discipline employees, or effectively recommend that the Employer issue specific discipline.

I further conclude that the Employer's reliance on *Bon Harbor* is misplaced. There, the LPNs' disciplinary recommendations, even if incorrect, would not be changed by the director of nursing or the unit manager. In contrast, the record here shows that the Director of Wellness has reviewed discipline and in the case of Samantha Ice – where the licensed nurse's recommendation exceeded her authority, and recommended an inappropriate level of discipline – the Director of Wellness disregarded the licensed nurse's determination.<sup>27</sup>

I am likewise not persuaded by the Employer's reliance on *Oak Park Nursing Care Center*, 351 NLRB 27 (2007); *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004); and *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003). In each case, the Board found either a direct link between discipline issued by the putative supervisors and more severe progressive discipline, or the employees' authority to discipline exceeded that exercised by the employees at issue in this case. For example, in *Oak Park* the Board noted that discipline issued by the LPN directly led to the suspension of one employee and the discharge of another. 351 NLRB at 28, 30. As noted above, with the exception of the isolated incident involving Samantha Ice, the discipline did not lead to additional, let alone more severe, discipline. In *Mountaineer Park*, the employees had the authority to recommend specific discipline, which was followed "100 percent of the time." 343 NLRB at 1475. Again, the one time a licensed nurse exceeded her authority to report misconduct, the Director of Wellness did not follow her recommendation. Finally, in *Progressive Transportation*, the record contained 33 examples where an employee effectively recommended discipline, leading the Board to conclude that the employee decided that a potential disciplinary issue should be brought to the employer's attention, discipline ensued. 340 NLRB at 1045. As noted above, the record in this case does not contain as many examples of discipline for all of the licensed nurses combined, and it lacks clear examples of how more severe discipline consistently and predictably followed any write-ups by licensed nurses.

In light of the record evidence as a whole, and after fully considering the parties' arguments on brief, I conclude that the licensed nurses' limited role in reporting caregivers' infractions, and their limited authority to send caregivers home only in cases of obvious misconduct, is insufficient to establish that they possess supervisory authority to discipline caregivers using independent judgment.

### **3. Evaluate**

#### **a. It Is Unclear Whether Licensed Nurses' Evaluations Affect Caregivers' Wages**

Section 2(11) of the Act "does not include 'evaluate' in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employees being evaluated, the individual performing such an

---

<sup>27</sup> I note that the majority in *Bon Harbor* relied heavily on the Board's decision in *Wilshire at Lakewood*, 345 NLRB 1050 (2005). Subsequently, the D.C. Circuit reversed the Board's decision, explicitly rejecting its conclusion that the putative supervisor's limited authority to document employees' infractions was evidence of her supervisory authority. *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007).

evaluation will not be found to be a statutory supervisor." *Harborside Healthcare*, 330 NLRB 1334 (2000). On the other hand, supervisory status is present when a purported supervisor evaluates employees using specific, well-defined criteria, and such evaluations have a direct effect on the evaluation results and terms of employment, such as wages, of evaluated employees. See, e.g., *Bayou Manor Health Center, Inc.*, 311 NLRB 955 (1993), (LPNs who evaluated CNAs using numerical criteria, and which directly determined the percentage of CNAs wage increase, were supervisors). See also, *Westwood Health Care Center*, 330 NLRB 935 (2000); *First Healthcare Corporation d/b/a Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997).

The Employer argues that the licensed nurses are statutory supervisors because there is a direct correlation between the evaluations licensed nurses have completed and the wage increases caregivers have received. Contrary to the Employer, I conclude that the record fails to establish a direct link between the evaluations and any related pay increases. Because the 2008 evaluations were not retained, it is difficult to determine precisely what role, if any, the licensed nurses played in the caregivers' overall score. Regardless, while the record shows that some caregivers received raises after they were evaluated in 2008, the evidence regarding the 2008 performance evaluation process fails to establish precisely what correlation might have existed between an employee's score on a performance evaluation and the amount of that employee's raise.

The most recent evaluation process, initiated just weeks before the hearing, has not been completed and, therefore, fails to establish how, if at all, licensed nurses' role in that process might affect caregivers' job status or wages. The licensed nurses' comments have been reviewed and incorporated with the Director of Wellness's observations and comments, but they have not been approved by the Executive Director and, therefore have not been presented to the reviewed employees. Thus, there is no clear evidence linking the licensed nurses' role in the evaluation process that would establish their status as supervisors as defined in the Act. See, e.g., *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); see also, *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999) and *Hospital General Menonita v. NLRB*, 393 F.3d 263, 267-68 (1<sup>st</sup> Cir. 2004).<sup>28</sup>

**b. The Nurses' Role in the Annual Evaluations is Neither Regular nor Substantial**

The Board has expressed that when a regular rank-and-file employee spends only a portion of his time performing supervisory duties, as for example evaluating other employees, the regularity and substantiality of those duties are of utmost importance. *Oakwood Healthcare*, 348 NLRB at 694. In *Oakwood*, the Board ruled that where an individual is engaged part of the time as a supervisor and the rest as a unit employee, the legal standard is whether the individual spends a regular and substantial portion of the work time performing supervisory functions. The Board explained that "regular" means according to a pattern or schedule, as opposed to sporadic substitution. For its finding on regularity, the Board relied on *St. Francis Medical Center West*, 323 NLRB

---

<sup>28</sup> Given the lack of concrete evidence of links between the licensed nurses' participation in the performance evaluation process and wage increases for caregivers, I find the cases cited by the Employer distinguishable.

1046, 1046-47 (1997), in which an employee was not found to be a supervisor when he only assumed supervisory duties while the actual supervisor was on medical leave for a few months. With regard to substantiality, the Board in *Oakwood* explained that it had not adopted a strict numerical test, but that it had found supervisory status where individuals had served in a supervisory role for at least 10-15 percent of their total work time. *Oakwood Healthcare*, 348 NLRB at 694.

Regardless of whether the licensed nurses' role in the evaluation process has affected or will affect caregivers' job status or wages, the licensed nurses' role in the process cannot be described as regular or substantial. The most recent evaluations are instructive in this regard: only a few of the licensed nurses were asked to evaluate fewer than half of the caregivers on staff; licensed nurses have not formally evaluated caregivers since at least 2008; and the time that each licensed nurse spent on the evaluations was relatively brief. Thus, under the test expressed in *Oakwood*, the evidence regarding licensed nurses' role in evaluations is insufficient to establish that they possess supervisory authority.

#### **4. Hiring, Firing, Effective Recommendation, and Secondary Indicia**

Given that licensed nurses have no role in hiring, firing, or effectively recommending such action, and the absence of other, secondary indicia of supervisory status, I find no other basis to conclude that licensed nurses are supervisors.

In addition, references in the licensed nurses' job descriptions describing their "supervisory" authority are insufficient to overcome the record evidence to the contrary. See, e.g., *Springfield Terrace LTD*, 355 NLRB No. 168, slip op. at 8 (August 27, 2010) (job descriptions are merely "paper authority" and are not given any controlling weight by the Board). I likewise find the licensed nurses' subjective opinion regarding their authority to be unpersuasive.

I also reject the Employer's contention that the ratio of licensed nurses to caregivers is evidence of their supervisory authority. I acknowledge that, at those times the Director of Wellness is not on site, caregivers and licensed nurses may be unsupervised. However, that is also true for all employees working the third shift from 10 p.m. to 6 a.m., work periods during which no licensed nurses are scheduled. Thus, for seven (7) shifts of eight (8) hours each, the Employer has no licensed nurse and no one else whom it contends is a 2(11) supervisor of the caregivers on site. Moreover, licensed nurses and caregivers are never truly "unsupervised;" the Director of Wellness is always available by cell phone, and employees regularly contact her when they are unable to resolve an issue at the facility.

#### **B. Other Employees' Community of Interest with the Petitioned-for Employees**

The Board has held that in order for a unit to be appropriate for purposes of collective-bargaining within the meaning of the Act, the unit need not be the only

appropriate unit or the most appropriate unit; it need only be *an* appropriate unit.<sup>29</sup> Thus, in determining whether a unit is appropriate, the Board first examines the petitioned-for unit. If the petitioned-for unit is *an* appropriate unit, the inquiry ends.<sup>30</sup> If it is not an appropriate unit, the Board then examines whether an alternative unit suggested by the parties or another unit not suggested by the parties is appropriate.<sup>31</sup> To determine whether a unit is appropriate, the Board uses traditional community of interest factors: functional integration; employee interchange; employees' skills and duties; terms and conditions of employment; common management and supervision; and bargaining history.

Based on the record as a whole, I conclude that the activities director position shares a sufficient community of interest with the petitioned-for job classifications and, therefore, should be included in the unit. Contrary to the Employer, I conclude that the community relations director does not share a community of interest with the petitioned for unit or the activities director and should be excluded. I also conclude that the administrative assistant and the receptionist positions should be excluded as office clerical positions that do not share a sufficient community of interest with the petitioned-for employees or the activities director.

The activities director works directly with residents, and licensed nurses and caregivers, on a daily basis. That position is functionally integrated with the Employer's resident care operations, and the activities director requires a skill set similar to that required of caregivers. Though not part of the activities director's regular job duties, I note that the current activities director regularly works as a caregiver as needed.

In stark contrast to the activities director, the community relations director has little if any interaction with residents once they move into the facility; indeed, the community relations director usually works independently off site, primarily in a sales capacity. Moreover, the community relations director is considered an exempt employee, and is paid a salary and commission as opposed to an hourly wage.

Finally, the administrative assistant and the receptionist, as office clerical employees, lack a sufficient community of interest with the activities director and the petitioned-for employees. The record evidence shows that the administrative assistant and the receptionist provide no care directly to residents, but rather attend to accounting and record-keeping tasks, as well as greeting visitors and taking telephone calls. They primarily work outside the locked ward and, aside from occasional contact regarding clerical aspects of their employment or residents' entry to or discharge from the facility, have little contact with petitioned-for employees or residents. Based on these factors, I conclude that the office clerical positions of administrative assistant and receptionist are properly excluded from the unit. See, e.g., *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164 (1995).

---

<sup>29</sup> *Barron Heating and Air Conditioning, Inc.*, 343 NLRB No. 58, slip op. at 3 (2004), citing *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 610 (1991); *Overnite Transportation Co.*, 322 NLRB 723 (1996).

<sup>30</sup> *Barlett Collins, Co.*, 334 NLRB 484, 484 (2001).

<sup>31</sup> *Overnite Transportation Co.*, 331 NLRB 664, 663 (2000).

#### **IV. CONCLUSION**

Based on the foregoing and the record as a whole, I find that the Employer has not met its burden of establishing that licensed nurses possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act. In particular, I find that the licensed nurses lack the authority to assign, responsibly direct, discipline, or evaluate. I also conclude that the activities director position shares a sufficient community of interest with the petitioned-for employees and should be included in the unit. Finally, I conclude that the community relations director, the administrative assistant, and the receptionist do not share a sufficient community of interest with the petitioned-for employees and the activities director and, therefore, should be excluded from the unit.

Accordingly, I shall direct an election in the following appropriate unit ("the Unit"):

All full-time and regular part-time licensed nurses, caregivers, cooks, dishwashers, housekeepers, and the activities director employed by the Employer at its Sedro-Woolley, Washington, facility; excluding all other employees, the community relations director, the administrative assistant, receptionists, department managers, the Executive Director, office clerical employees, guards, and supervisors as defined in the Act.

There are approximately 37 employees in the Unit found appropriate.

##### **A. List of Voters**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994).

In order to be timely filed, such list must be received in Region 19 of the National Labor Relations Board, Jackson Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174 on or before **November 23, 2010**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

##### **B. Notice Posting Obligations**

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **C. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **November 30, 2010**. The request may be filed through E-Gov on the Board's web site, [www.nlr.gov](http://www.nlr.gov), but may not be filed by facsimile.<sup>32</sup>

**DATED** at Seattle, Washington, this 16<sup>th</sup> day of November, 2010.



Richard L. Ahearn, Regional Director  
National Labor Relations Board, Region 19  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, Washington 98174

---

<sup>32</sup> To file a request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, [www.nlr.gov](http://www.nlr.gov).